

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR -6 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2010-0398-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| SHAWN PETER DUGAN, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20081123 and CR20081841

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Shawn P. Dugan

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Pursuant to plea agreements, petitioner Shawn Dugan was convicted in CR20081841 of one count of fraudulent scheme and artifice, a class two felony, and in CR20081123 of the same offense. Both agreements provided the sentences would be concurrent and he was sentenced to aggravated, concurrent, ten-year prison terms. Dugan sought post-conviction relief in both causes pursuant to Rule 32, Ariz. R. Crim. P., raising a number of claims, including that he was entitled to additional presentence incarceration credit. The trial court granted relief on that claim but rejected the remaining ones, which included challenges to the sentences.

¶2 In a successive notice of post-conviction relief, Dugan claimed there had been a significant change in the law entitling him to relief from the sentence, which the court dismissed summarily. In his third notice of post-conviction relief, which Dugan filed in August 2010, he again challenged the sentence, claiming the court improperly relied on aggravating circumstances that all fell under the “catch-all” subsection of the sentencing statute and Rule 32 counsel in the first post-conviction proceeding had been ineffective for not raising this challenge. The court summarily dismissed the notice and this petition for review followed. We will not disturb the court’s ruling unless it abused its discretion in determining whether post-conviction relief is warranted. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶3 In its minute entry denying relief, the trial court identified the claims Dugan had specified in the Rule 32 notice that he intended to raise, primarily based on *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009). The court stated that although it had found among the aggravating circumstances his prior criminal history, that factor did not fall

under the “catch-all” provision, *see* A.R.S. § 13-701(D)(24), but rather it fell under § 13-701(D)(11), a previous felony conviction “within the ten years immediately preceding the date of the offense.” Citing Dugan’s 1996 conviction for fraudulent scheme and artifice for which he had received a ten-year prison term, and specifying the periods of Dugan’s incarceration and release, the court found the felony was “a statutorily enumerated factor” and concluded the sentencing range was not, therefore, established under the “catch-all” subsection. And because the underlying claim was not viable, the court reasoned, the related claim of ineffective assistance of counsel also failed.

¶4 Dugan has not persuaded us the trial court erred in dismissing his notice. Because its ruling is correct, based on the record before us and the applicable law, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). But even assuming the court’s reliance on Dugan’s criminal history falls under § 13-701(D)(24), rather than subsection (D)(11), the court did not abuse its discretion in dismissing the notice. *Schmidt* is based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, including *Blakely v. Washington*, 542 U.S. 296 (2004). And in his plea agreement, Dugan expressly agreed to waive his “right to all trials . . . [which] includes any jury determination of aggravating factors beyond a reasonable doubt.” He further agreed “the Court, using a standard of preponderance of the evidence, may find the existence of aggravating or mitigating factors which may impact my sentence or disposition.” Thus, he waived the challenge to the sentence based on the underpinning of *Schmidt*, even though it was decided in June 2009, after he had entered the plea and after

his January 2009 sentencing. *Schmidt*, therefore, is not a significant change in the law that would have entitled Dugan to relief.

¶5 For the reasons stated, we grant the petition for review but deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge